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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ELPIDIO DEJESUS TELLEZ, Defendant and Appellant.	C077915 (Super. Ct. No. 12F07541)

Defendant Elpidio DeJesus Tellez appeals following conviction of second degree murder with personal and intentional discharge of a firearm causing death (Count One), possession of a firearm by a felon (Count Two), and receipt of stolen property, a .45 caliber handgun (Count Three) . (Pen. Code, §§ 187, 496, subd. (a), 29800, subd. (a)(1), 12022.53, subd. (d); statutory section references that follow are to the Penal Code unless

otherwise set forth.) Defendant admitted he killed the victim but claimed it was in self-defense.

Defendant contends the trial court erroneously limited defense investigation into whether this homicide victim previously committed an unsolved murder in 2003, and abused the court's discretion by allowing a witness to "speculate" that the victim was not armed. Defendant also claims the prosecutor's argument to the jury improperly infringed on defendant's privileged communications with his lawyer and improperly invoked a biblical passage.

We reject all contentions but remand to the trial court to consider whether to exercise its newly-legislated discretion to strike the section 12022.53 gun enhancement pursuant to legislative amendment effective January 1, 2018, and applicable to cases pending on appeal. (§ 12022.53, subd. (h); Stats. 2017, ch. 682, § 2 (Sen. Bill No. 620), eff. Jan. 1, 2018; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090.) We otherwise affirm the judgment.

FACTS AND PROCEEDINGS

At trial it was undisputed that defendant shot and killed Jesse James Nunez on November 7, 2012, around 8:40 p.m., outside a bar (then called the Monte Carlo Club) on the corner of 15th and S Streets in Sacramento. Defendant testified at trial that he acted in self-defense.

Defendant and victim Nunez had been involved, at different times, with the same woman, Raquel A. She married defendant in 1999 and had three children with him, but the couple divorced in 2009. Raquel soon began dating Nunez and they lived together for a couple of years until they broke up in September 2011. While Raquel lived with Nunez, defendant would go to their home to pick up or drop off his children, without incident.

After Raquel and Nunez split up, Raquel and defendant made an effort to get back together, but it did not last, and Raquel began dating another man. She believed defendant was having a hard time accepting the end of their relationship, because he would phone her and threaten to come over and "shoot whoever was in [her] house."

Raquel testified she received a phone call from Nunez around July or August 2012, in which he said defendant was going to be injured, and it was out of Nunez's hands. Raquel told defendant about the call and that he should protect himself. But she said nothing about this call when interviewed by police after Nunez was killed (though she testified she thought she did tell police). Defendant testified he obtained a gun after Raquel told him about Nunez's call.

Defendant frequented the Monte Carlo Club. Just before the shooting, defendant was standing outside the bar, talking on his cell phone to his uncle.

The victim arrived at the bar in a car with two men (the victim's friend Daniel M. and Daniel's friend Rogelio D.). They stopped to use the restroom. Defendant saw them approach the bar entrance. Defendant stood with his side to them, holding his cell phone to his ear with one hand and holding his gun by his leg, out of their sight.

As Nunez approached, defendant fired three gunshots at Nunez from a distance of about 16 feet. Two bullets struck the victim, one in his chest and a fatal shot in his back.

Video surveillance cameras did not capture the shooting itself, and other than defendant no witness testified to having seen the shooting or having seen Nunez with a gun. Daniel testified he did not see the shooting and did not hear anything other than the gunshots, while Rogelio claimed he remembered almost nothing because he was drunk. Neither saw Nunez with a gun.

Nunez died at the scene. No gun was found on or near Nunez. One of Nunez's companions removed Nunez's cell phone but could not say why, and neither companion saw Nunez with a gun. Defendant insists that one of Nunez's companions removed from Nunez not only a cell phone, but also a gun, but there is no evidence that Nunez had a

gun (other than defendant's self-serving testimony) or that anyone removed it from the scene.

A police officer patrolling nearby heard the gun shots at 8:40 p.m., saw a white SUV speed away from the Monte Carlo Club, pursued it, and found it unoccupied on T Street. The .45 caliber handgun that killed Nunez was found in the yard next door. The gun had been stolen from a residence in January 2012, and DNA found on the gun was consistent with defendant's DNA, and approximately one out of 190 trillion Hispanics would be expected to have a similar DNA profile.

After abandoning the SUV and throwing the gun away defendant then went to get food and attempted to get past the police perimeter by calmly walking with another person.

The registered owner of the SUV had turned over physical custody of the SUV to defendant after defendant made a partial payment toward its purchase. A cell phone in the SUV was later connected to defendant, who admitted it was his account. The cell phone showed text messages to Raquel in October 2012 asking for sex, saying "you chose him and not me," and "you don't love me like I love you."

Later on the night of the shooting, police located defendant and took him into custody on outstanding traffic warrants. He had the white SUV's keys on him.

When police first questioned defendant around 8:00 a.m. the morning after the shooting, defendant denied any involvement or knowledge about the shooting, and denied being at the Monte Carlo Club that night.

The police left Raquel and defendant alone in the interview room. She told him witnesses were saying they just heard gunshots and did not know what happened. Defendant said, "I blacked out. My brain went blank --." She told him to "shut up." He asked for her help. She responded, "you don't have to ask." He told her he was going to plead insanity and would need her help. He asked if he and Raquel had a "good, solid game plan." She promised to help however she could. Defendant said he could not get

over Raquel and wanted her back. She said she had told the police that defendant was over her.

At trial, defendant testified on his own behalf. He admitted prior convictions for grand theft, petty theft, and false imprisonment of Raquel in 1997. He admitted shooting Nunez but claimed it was in self-defense. On the night of the shooting, defendant was outside the bar, talking to his uncle on the phone. Defendant saw headlights of a car shining on him, then saw three people near the car and recognized that one of them was Nunez. Defendant got scared and did not know what to do. He turned away, thinking he would just leave if they walked past him. He panicked when the three men "split up," because he thought they were trying to set up a "perimeter" to surround him, so he took his gun out of his pocket. He acquired the gun in September 2012 after Raquel expressed concern for his safety and said Nunez was threatening to shoot defendant. Defendant did not know the gun was stolen and bought it for $600 cash from someone in the neighborhood whom he did not know.

According to defendant, Nunez walked toward the entrance, pulled a gun out of his pocket, and lifted up his hand with a pistol in it. Defendant "just fired" his gun out of fear of getting killed.

After Nunez fell to the ground, defendant panicked and fled.

Defendant admitted he lied to police but claimed it was because he was "scared of the situation" and did not trust the detectives and anyway did not remember talking with police because the whole night was a complete blur.

Raquel testified as a defense witness that she told defendant to protect himself because Nunez was threatening him and blamed defendant for Nunez's inability to rekindle his relationship with Raquel. It is not in defendant's character to shoot someone with a gun.

The jury asked the court multiple questions during deliberations and at one point reported a deadlock. The trial court offered to have the lawyers give further argument on

specific questions, and the jury accepted. The jury identified two areas, and the trial court had the lawyers give further argument (1) on the meaning of "willful, deliberate, and premeditated," and (2) on the meaning of express malice and implied malice as it applies to second degree murder and how imperfect self-defense fits into the case.

The jury returned its verdict in September 2014, finding defendant not guilty of first degree murder but guilty of second degree murder with personal and intentional discharge of a firearm causing death (Count One), guilty of possession of a firearm by a felon (Count Two), and guilty of receipt of stolen property (Count Three).

In November 2014, the trial court sentenced defendant to prison for 40 years to life (15 years to life for murder and 25 years to life for the firearm enhancement). The court also sentenced defendant to three years for firearm possession and eight months for stolen property but stayed those sentences pursuant to section 654.

DISCUSSION

I

Defense Investigation into 2003 Unsolved Murder

Defendant contends the trial court and the district attorney's office interfered with and hampered the defense investigation of victim Nunez's potential involvement as a killer in an unrelated unsolved murder in 2003. Defendant claims interference with his constitutional right to present a defense. We disagree.

A. *Background*

Before trial began in August 2014, the defense team got an anonymous tip in March or April of 2014, that Nunez, Daniel, and Rogelio went to the club that night to find and kill defendant, and that Nunez and Daniel or Rogelio murdered a man named Manuel Parra in 2003. Parra's murder was an unsolved case. The informant was identified and was interviewed by police for the defendant's prosecution. The district

attorney's and city attorney's offices resisted the efforts of defendant's counsel to obtain information about the 2003 case, on the ground it was unrelated to the 2012 killing of Nunez.

On May 29, 2014, defendant's lawyer filed a motion to compel discovery of documents about Parra's murder, arguing it was relevant to show the victim's propensity for violence as it related to defendant's self-defense claim. The city, joined by the district attorney's office, opposed the motion, arguing the official information was privileged (Evid. Code, § 1040), and preserving confidentiality of the information in the ongoing investigation was in the interest of the public, safety and willingness of potential witnesses to testify, and integrity of that investigation.

The file was lodged under seal for the trial court's in camera review.

The discovery matter was put off for the first day of trial, August 19, 2014.

After discussion in chambers, the trial court noted that none of the documents identified Nunez as a suspect in the 2003 murder, and his name was mentioned only once in a police report that mentioned he went to the hospital when he heard Parra was involved in a shooting. The court also noted the informant's credibility was at issue. The court stated: "My gut instinct tells me that these reports were -- ultimately in the long run probably not help the defendant that much. [¶] But I've kind of balanced that. I am balancing that with the defendant's right to put on a defense in this case. It is difficult after listening to the in camera recitation of events to come away so with any conclusion other than there is still a lot of rumor that's out there in the families that is being looked at by the defense. [¶] But overall I think I'd have to come down on the side of the fact the defense should be able to explore some of those rumors because I do think that with the information they have, that new statements could be taken with a new suspect in mind. [¶] In other words, . . . detectives never asked certain questions because they didn't have Mr. Nunez as a suspect. Had they had the information back at the time, they

could have easily asked these questions and could have ruled Mr. Nunez out or in as a suspect. [¶] And they weren't looking at him apparently."

The court ordered defendant's prosecutor to allow defendant's counsel to look at the documents in a controlled setting and ordered defendant's counsel not to disclose the information to defendant or to anyone other than defense counsel's associate and investigator.

The prosecutor asked the trial court to add an order that the defense record any interviews with witnesses in Parra's case (some of whom may not have been contacted for up to 10 years and at least a couple of whom came forward "kind of on the QT"), "so that if at some point in the future some issue comes up about when these witnesses learned things, how they learned them, et cetera, we have an absolute complete and irrevocable record of what transpired between those witnesses and the defense investigators." Defense counsel said, "that's fair." The order required that any contacts be recorded and the recording filed under seal with the court.

Six days later, the defense asked for a two week continuance for investigation. The court granted one week but reiterated "there is still somebody out there who committed [the Parra] homicide and at the moment, anyway, it's an unsolved homicide and so it is in the interest of the public and the interest of the police department, obviously, and the public to make sure that information is just not widely disseminated that in any way [a]ffects the ability of the police to conduct an investigation" on a homicide for which there is no statute of limitations.

On August 26, 2014, defendant's attorney reported he had ascertained addresses and phone numbers but "had some trouble getting them to cooperate with us," and the recording requirement ordered by the court was "causing a problem with [his] investigator and her ability to take statements from the individuals in two respects. [¶] She has been able to speak to three people who had no problem talking to her, but everybody else they're refusing first to talk to us in person. They have indicated, a lot of

them, that they would be willing to talk to us over the phone. [¶] However, we can't record them. We tell them [*sic*] if we're going to record them, that they're not going to speak to us." Defense counsel asked the court to lift the recording requirement because "it's hindering our ability to do an effective investigation in this matter."

Upon questioning by the court, defense counsel admitted he did not know for sure if they would consent to being recorded; he was just anticipating it could be a problem.

The trial court declined to lift the recording requirement, stating the court kept in mind defendant's right to a fair trial and right to present a defense, balanced against the public's interest in eventual solution of the 2003 case, and "it's still hard to imagine that it's going to lead to something that will be that helpful to your . . . client overall." The court also denied a continuance, because the defense could continue investigating the 2003 case while the court proceeded with in limine motions for the current trial.

On September 8, 2014, defense counsel asked for a one-week continuance to investigate the 2003 murder, stating there remained five people he wanted to interview. Two refused to speak with the defense but indicated they would speak with *the prosecution*. The defense had been unable to contact the other three. Of the total 14 persons of interest to the defense, a little over half had no information helpful to defendant. And at present, defense counsel did not intend to submit any evidence regarding the 2003 case.

Again balancing the interests, the trial court denied the request for continuance.

B. *Analysis*

Defendant argues the government's interference with his right to interview and present witnesses violates his constitutional right to a fair trial and right to present a defense. Defendant does not make clear whether he is attacking the denial of his request for continuance or the requirement that he record interviews. Either way, there is no constitutional violation.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants in state courts " 'a meaningful opportunity to present a complete defense.' " (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.) A defendant who claims self-defense in a homicide prosecution may present evidence of the violent character of the victim. (Evid. Code, § 1103; *People v. Shoemaker* (1982) 135 Cal.App.3d 442, 446-448.) Although the trial court has discretion to exclude such evidence under Evidence Code section 352, that discretion did not come into play here because no such evidence was ever proffered.

Thus, this appeal does not raise any question of erroneous exclusion of evidence, since no evidence was proffered.

Defendant fails to show the government unconstitutionally interfered with his right to interview or present witnesses. The trial court required the prosecution to show documents from the 2003 case to defense counsel, who was able to locate and contact many potential witnesses, but without uncovering any information helpful to the defense in this case.

Neither the trial court nor the prosecution prevented defendant from presenting his defense that he shot Nunez in self-defense. The complete exclusion of evidence intended to establish an accused's defense may impair his right to due process, but exclusion of only some evidence, on a subsidiary point, does not interfere with that constitutional right. (*People v. Cunningham* (2001) 25 Cal.4th 926, 999.) Here, there was no complete exclusion but merely reasonable restriction placed on a search for evidence that may or may not have existed and may or may not have been of significance to defendant's case.

To the extent defendant means to suggest the recording requirement impeded the defense efforts, defense counsel not only failed to object, but initially agreed the requirement was fair, which forfeits any appellate challenge. (*People v. Smith* (2001) 24 Cal.4th 849, 852.) If defendant means to suggest the court erred in failing to lift the recording requirement at defense counsel's request in August 2014, defense counsel at

that time merely speculated the requirement might hinder his investigation. Counsel identified no witness who had refused to speak because of the recording requirement.

To the extent defendant complains of the trial court's denial of his requests for continuance, he fails to show a constitutional violation.

Not every denial of a request for continuance violates due process. (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589.) Whether a denial of a continuance amounts to a constitutional deprivation is determined by the circumstances present in the particular case, particularly in the reasons presented to the trial court at the time the request is denied. (*Ibid*.)

"The granting or denial of a continuance during trial traditionally rests within the sound discretion of the trial judge. [Citations.] To establish good cause for a continuance, appellant had the burden of showing that he had exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven. [Citations.]" (*People v. Howard* (1992) 1 Cal.4th 1132, 1171.)

Defendant fails to show a constitutional violation or abuse of discretion. Nothing indicated that any of the persons with whom the defense wished to speak, would have any relevant or material evidence helpful to defendant. In about three weeks of investigation, the defense had contacted almost 14 people, most of whom had no helpful information or did not want to talk to defendant's defense team. Only three people had not been contacted, and absolutely nothing indicated that any had information helpful to defendant's case.

Additionally, we agree with the People that, even assuming for the sake of argument that the court should have granted a continuance or lifted the recording requirement, there is no prejudice warranting reversal. Defendant claims structural error commanding reversal when the government prevents a defendant from securing the

appearance at trial of a material witness helpful to the defense case. Here, however, there is no material witness helpful to the defense. While a refusal to allow a defendant to present a defense infringes upon a constitutional right and is subject to the harmless error of *Chapman v. California* (1967) 386 U.S. 18, 23 [error requires reversal unless harmless beyond a reasonable doubt], a rejection of only some defense evidence is reviewed under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 [whether reasonably probable defendant would have obtained a more favorable result]. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)

Here, there is no prejudice. Defendant admitted he killed Nunez. His claim of self-defense was weakened by various facts, e.g., there was no evidence that Nunez had a gun (other than defendant's self-serving testimony); defendant fled the scene and, when chased by police, abandoned his vehicle and threw his gun away. He then went to get food and attempted to get past the police perimeter by calmly walking with another person. In his initial police interview, defendant did not share a story of self-defense but denied any involvement at all, and neither defendant nor Raquel told police that Nunez had threatened defendant. Defendant strategized with Raquel at the police station, with no mention of self-defense.

We conclude defendant fails to show grounds for reversal based on the unrelated 2003 murder.

II

Testimony Whether Victim Had a Gun

Defendant claims the trial court improperly allowed the victim's friend, witness Daniel M., to "speculate" that victim Nunez did not have a gun that night.

A. *Background*

The prosecutor questioned Daniel as follows:

"Q: Did you have a gun that night?

"A: No.

"Q: Did Mr. Nunez have a gun that night?

"A: No.

"[Defense counsel]: Objection, calls for speculation.

"THE COURT: Overruled.

"[Prosecutor]: Did [Rogelio] have a gun that night from what you saw?

"A: No.

"Q: Did any of you have any weapons at all to your knowledge?

"A: No."

B. *Analysis*

Evidentiary rulings are reviewed for abuse of discretion. (*People v. Rowland* (1992) 4 Cal.4th 238, 264.)

Defendant argues the trial court should have sustained his objection on the ground of "speculation" because of a lack of "foundation" that Daniel had personal knowledge that the victim did not have a gun that night, i.e., there was no evidence that Daniel had frisked or otherwise monitored the victim.

The Attorney General argues defendant cannot complain on appeal about "lack of foundation," having objected only on the ground of "speculation." (Evid. Code, § 353 [objection must specify ground].) We will assume for purposes of this appeal that the objection sufficed to express the defense concern that the witness might not have personal knowledge. (*People v. Rodriguez* (2014) 58 Cal.4th 587, 630 [an examiner's question asking a lay witness to testify to facts that the witness has not personally observed, or to state an opinion not based on his or her own observations, calls for speculation and conjecture by the witness and is prohibited by' Evidence Code sections 702 and 800]; see Evid. Code, § 702 [testimony of witness concerning particular matter is inadmissible unless he has personal knowledge of the matter].)

However, for a statement to be supported by sufficient personal knowledge to be admissible, direct proof of perception or proof that forecloses all speculation is not required. (*People v. Cortez* (2016) 63 Cal.4th 101, 123-125 [shooter had adequate personal knowledge for permissibility of his statement that defendant went along with shooter's plan].)

Here, the evidence adequately showed a basis for personal knowledge, because Daniel was Nunez's close friend and was married to Nunez's cousin, and Nunez was "Copa" at the baptism of Daniel's daughter, and Daniel was with Nunez for at least half an hour before they arrived at the club. They were in fairly close proximity from the car to the club. And defense counsel certainly had an opportunity during cross-examination to question the witness how and when he gained knowledge that Nunez did not have a gun.

Even assuming for the sake of argument that the trial court should have sustained defendant's objection, he fails to show prejudice. He acknowledges the appropriate inquiry is whether it is reasonably probable that the jury would have reached a result more favorable to the defendant in the absence of trial court error. (*People v. Jandres* (2014) 226 Cal.App.4th 340, 357, 360.) Defendant presents no argument about prejudice but only his unsupported conclusion that "the evidentiary error is prejudicial, because the record reveals a distinct possibility that the jury would have returned a result more favorable to [defendant] had it not been for the error." This does not suffice.

To the contrary, we are confident there was no prejudice. The prosecutor fixed any problem by asking Daniel, "Did any of you have any weapons at all to your knowledge?" -- to which Daniel answered "No." That police found in Rogelio's trunk an empty holster for a "little" gun (for a .22 gun he no longer owned) does not establish prejudice, particularly in light of the strong evidence of defendant's guilt.

Moreover, had the trial court sustained the objection, the prosecutor would have rephrased the question to ask Daniel if the victim had a gun "from what you saw" -- the

same phrasing the prosecutor used to ask Daniel whether *Rogelio* had a gun that night. This is what occurred when defendant earlier objected on grounds of speculation when the prosecution asked witness Rogelio whether the victim had a gun:

"Q Did [victim] Mr. Nunez have a firearm that night?

"[Defense counsel]: Objection, calls for speculation.

"THE WITNESS: I don't know.

"THE COURT: Overruled.

"Q [By prosecutor] You don't know?

"A No, I don't know.

"Q Did you see a firearm with Mr. Nunez that night?

"A I don't know. I -- no, I didn't."

We conclude there was no prejudicial evidentiary error in Daniel's testimony.

III

Attorney-Client Privilege

Defendant claims the prosecutor -- by arguing to the jury that defendant "contrived" his claim of self-defense at the "11th-hour" (a few months before trial) after seeing the prosecution's file -- improperly presented the jury with evidence of privileged attorney-client communications between defendant and defense counsel. However, defendant forfeited the issue, waived any privilege, misrepresents the record, and fails to show reversible error on the merits.

A. *Background*

During cross-examination by the prosecutor, defendant admitted that his lawyer showed him the prosecutor's file, which the prosecutor had transmitted to defense counsel as part of "discovery." The defense made no objection.

The defense also made no objection to the prosecutor's closing argument. The prosecutor argued to the jury that defendant, before admitting he shot Nunez, had first

tried out other theories: "[Theory] A is S.O.D.D.I., some other dude did it. [¶] B is I blacked out. [¶] C was insanity. [¶] D is self-defense."

"You put [defendant's continued feelings for Raquel] together with what the officers learned afterwards and it becomes apparent why we have seen defense D [self-defense] in this courtroom. [¶] The [law enforcement] investigators continue to work after the 8th of November. They did not rest on their laurels. They continued to come up with information. And as the defendant indicated, he got copies of those reports. [¶] His attorney did it [*sic*] his duty. Made sure that he got all the materials in the case so he could prepare a defense accordingly.

"So [defendant] learned that the detectives knew that the defendant was the actual owner of the getaway car . . . . [¶] He learned that a Bel Air receipt, which is left in that vehicle, came back to a purchase made the day before where he is clearly caught on surveillance making that [purchase]. [¶] He learned that he was on surveillance tapes from La Garnacha and the martial arts building just shortly after the murder before he walks out of the perimeter acting in -- in behavior that only [*sic*] be described as extremely suspicious. [¶] He learned that the cell phone records put him in proximity to the Monte Carlo Club. . . . [¶] . . . [¶] Learned that the ballistics established beyond question that the .45 Cal. handgun found close to the defendant's vehicle was in fact the gun used to kill Jesse Nunez. [¶] And perhaps most importantly, learned that his DNA was on the gun. . . . [H]e learned that after his interview, after his talk with Raquel A[.] and before he testified here.

"He learned something else. That would have been the statements of [the victim's two friends]. And when he read those statements, the People submit he spied in them an opportunity. [¶] He grabbed on to some very bizarre behavior on the part of this [*sic*] two young men that night, and that was the removal of the victim's cell phone from his body and tossing it afterwards. Aah-ha says [defendant]. They took something away

from the victim and threw it away. What if that was a gun? And we're off to the races. [¶] . . . [¶]

" . . . This [self-defense] is a contrived defense. It is the fourth defense that the defendant has come up with during the course of these events. [¶] There was no self-defense here at all. . . ."

B. *Analysis*

A defendant may not complain on appeal about prosecutorial misconduct in closing argument unless the defendant made a timely objection in the trial court and requested that the court admonish the jury. (*People v. Duff* (2014) 58 Cal.4th 527, 567 (*Duff*); *People v. Harrison* (2005) 35 Cal.4th 208, 242-244 (*Harrison*).) Having failed to object, defendant has forfeited the matter.

Defendant argues his attorney's failure to object placed upon the trial court a duty to step in and protect the privilege. However, the cited authority refers to exclusion of information where the holder of the privilege is not a party to, or is not present at, the proceedings. (Evid. Code, § 916; *People v. Vargas* (1975) 53 Cal.App.3d 516, 527 [in hearing to consider whether defendant's absence from court was voluntary, court should have disregarded defense counsel's disclosure of privileged communications, but no prejudice].) Here, defendant was a party and was present.

Moreover, to the extent any "attorney-client communications" are at issue here (Evid. Code, § 952 [information transmitted between client and lawyer in confidence by a means which, so far as the client is aware, discloses the information to no third persons]), defendant waived the attorney-client privilege by failing to assert the privilege when he testified at trial that his attorney transmitted the prosecution's discovery file to him. (Evid. Code, § 912.)

Defendant cites authority that an attorney's act of handing a police report to a client is a "communication" within the attorney-client privilege. (*In re Navarro* (1979)

93 Cal.App.3d 325, 327, 330 (*Navarro*), accord *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 598-601 (*Mitchell*).) Defendant in a footnote cites case law that defense counsel is "captain of the ship" and makes the choice of defense when more than one defense is available.

The mere transmittal of information from lawyer to client may constitute a privileged communication, even if the information is available to others. (*Mitchell, supra,* 37 Cal.3d at pp. 598-601 [in tort case alleging chemical contamination, privilege applied where plaintiff's attorney gave client information about dangers of the chemical].)

But, the cases defendant cites do not help defendant here, because he waived any privilege by failing to assert the privilege when he testified on cross-examination that his lawyer had transmitted the prosecution's file to him. The privilege is waived if the holder discloses the communication or consents to disclosure without coercion, and consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has legal standing and opportunity to claim the privilege. (Evid. Code, § 912; *Hiott v. Superior Court* (1993) 16 Cal.App.4th 712, 719-720 [client waived privilege by consenting to disclosure of videotaped conversation between client and attorney and by failing to claim privilege when she had legal standing and opportunity to do so].)

In contrast, the privilege was asserted and there was no waiver in the cases defendant cites here. *Navarro* involved a murder prosecution in which the defendant's former attorney from an unrelated robbery case was called as a witness at the preliminary hearing and asked whether she had shown the defendant a robbery arrest report, the contents of which might have provided a motive for the murder. The attorney, who was not representing the defendant in the murder case, asserted the attorney-client privilege, but the magistrate held her in contempt of court based on an erroneous belief that the

privilege applied only to matter that emanates from the client. (*Id*. 93 Cal.App.3d at pp. 327-328.) The Court of Appeal affirmed the superior court's grant of a writ of habeas corpus and discharge of the contempt order. The public nature of the report did not defeat confidentiality. Knowing the identity of a published or public document is equivalent to examining or reading the document. Thus, the identity of the document transmitted between attorney and client was privileged. (*Id*. at p. 329.)

In *Mitchell, supra*, 37 Cal.3d 591, a tort action alleging chemical contamination of ground water near the plaintiffs' home, the defendants sought to compel a plaintiff to answer interrogatories about any warnings, information, or documents about the chemical that she received from her attorneys. The trial court compelled discovery, agreeing with defendants that the plaintiff, by seeking damages for emotional distress based on harmful effects of the chemical, put the information from her attorneys at issue. (*Id*. at p. 603 & fn. 4.) The Supreme Court disagreed with the trial court and held the plaintiff, by stating in deposition that she had discussed the chemical with her attorneys, did not waive the attorney-client privilege by disclosing a "significant part" of the communication. (*Id*. at pp. 602-603.) Her claim for emotional distress did not impliedly waive the attorney-client privilege, since she did not put the information gained from otherwise privileged communications directly at issue, and since disclosure of attorney-client communication was not necessary for a fair adjudication of her emotional distress claim. (*Id*. at pp. 603-609.) And public policy supported preserving the attorney-client privilege, to avoid a tactic used by some defendants of arguing that plaintiffs' injuries were caused not by exposure to chemicals, but rather by hysteria induced by plaintiffs' advisors. (*Id*. at pp. 609-610.)

Here, defendant, without objecting or asserting the privilege, testified he received the prosecution file from defense counsel. He accordingly waived any privilege. (Evid. Code, § 912; *People v. Prince* (2007) 40 Cal.4th 1179, 1243.)

We additionally observe the prosecutor never attributed the self-defense theory to defense counsel strategy, but specifically argued defendant came up with the self-defense claim by himself after seeing the prosecution's evidence against him. In any event, defendant's claim of prosecutorial misconduct fails because he forfeited it by failing to object in the trial court, and there was no misconduct because defendant waived the attorney-client privilege by testifying his attorney gave him the prosecution file.

We conclude defendant fails to show any violation of the attorney-client privilege warranting reversal.

IV

Biblical Allusion in Closing Argument

Defendant argues the prosecutor committed prejudicial misconduct in closing argument to the jury by invoking a biblical passage. Defendant's failure to object in the trial court forfeits the contention. Assuming it is not forfeited, defendant fails to show prosecutorial misconduct or prejudice.

A. *Background*

The trial court properly instructed the jury that "If the defendant fled or tried to flee immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself."

The prosecutor, in arguing to the jury that defendant's flight reflected consciousness of guilt, said:

" . . . [A] lot of legal definition that you heard from the Judge is nothing more than distilled common sense. And this is a perfect example of it. If the defendant fled, that conduct may show that he was aware of his guilt.

"And I think that goes all the way back to the Bible, the wicked man flees when no man pursues. I can't remember what book that is. This is a concept as old as humanity.

"Why do people run? If you . . . you've done nothing wrong, if you committed a legally justifiable homicide, you stay around and talk to the officers about the horrible thing that just happened that you were compelled by circumstances to do. You do not flee from a legitimate self-defense case. You stay around and you talk. But he fled, and that tells you what common sense tells you.

"The law tells you the same thing. You, as finders of fact, can use that as evidence of consciousness of guilt. The reason he's fleeing is he's guilty and he knows it. He wants to put as much distance between himself and that evidence and that body as quickly as possible."

The defense did not object to these comments.

B. *Analysis*

A defendant may not complain on appeal about prosecutorial misconduct in closing argument unless the defendant made a timely objection in the trial court and requested that the court admonish the jury. (*Duff, supra,* 58 Cal.4th at p. 567; *Harrison, supra,* 35 Cal.4th at pp. 242-244.)

Defendant did not object in the trial court and makes no argument on appeal that objection would have been futile or that his failure to object was otherwise excused. Accordingly, his appellate contention is forfeited.

Even if not forfeited, the prosecutor's passing reference to the Bible was not misconduct and was not prejudicial. A prosecutor's appeal to religious authority is improper because it tends to diminish the jury's personal sense of responsibility for the verdict and carries the potential the jury will believe a higher law should be applied and ignore the trial court's instructions. (*People v. Hill* (1998) 17 Cal.4th 800, 836-837.)

However, when a prosecutor does not use biblical allusion as an appeal to religious authority, there is no prosecutorial misconduct. (*Harrison, supra*, 35 Cal.4th at p. 248.)

Here, the prosecutor did not appeal to religious authority or argue it as a higher law, but merely pointed out that California law -- allowing the jury to consider flight as evidence of guilt -- reflected a "common sense" concept "as old as humanity."

Defendant cites a New York case, *People v. McKenzie* (1983) 468 N.Y.S.2d 408 [97 A.D.2d 774], which granted a new trial for attempted robbery after the prosecutor argued to the jury that the defendant's " 'flight and his actions speak louder than any testimony in this courtroom. It was said some two thousand years ago "[t]he wicked flee when no man pursue, but the righteous stand as brave as young lions." He fled because he knew he had just committed an attempted robbery and he had to get rid of that gun.' " (*Id*. at p. 409.) However, case law from other states lack precedential value in California and, though we may consider such cases (*People v. Mays* (2009) 174 Cal.App.4th 156, 167), the New York case does not support defendant's position in this appeal. The reason for reversal in the New York case was the cumulative effect of multiple errors, including (1) instructional error on how to evaluate identification evidence, where identification was a critical issue at trial, (2) the trial court's failure to instruct the jury "on the ambiguity of evidence of flight and as to the weakness of such evidence as an indication of guilt" which was rendered particularly prejudicial by the prosecutor's arguments to the jury, and (3) multiple instances of the prosecutor disparaging the defendant on cross-examination and in closing argument. (*McKenzie, supra*, 468 N.Y.S.2d at pp. 408-409.) Here, as indicated, the trial court did instruct the jury that flight was in itself insufficient to prove guilt, and there is no cumulative error warranting reversal.

Moreover, when the issue of prosecutorial misconduct focuses on comments by the prosecutor to the jury, the question is whether there is a reasonable likelihood the jury construed or applied the complained-of remarks in an objectionable fashion. (*Harrison, supra*, 35 Cal.4th at p. 244.) Prosecutorial misconduct violates the federal Constitution

when it infects the trial with such unfairness as to make the conviction a denial of due process, and it violates California law only if it involves the use of deceptive or reprehensible methods to attempt to persuade the jury. (*Id*. at p. 242.) Here, the prosecutor's comments did not infect the trial with unfairness, and there is no reasonable likelihood the jury construed or applied the prosecutor's comments in an objectionable fashion.

Defendant forfeited his claim of prosecutorial misconduct and, in any event, fails to show prejudicial prosecutorial misconduct.

V

Remand to Consider Gun Enhancement

While this appeal was pending, the Legislature amended section 12022.53 to give trial courts discretion to strike gun enhancements -- an amendment operative January 1, 2018, and applicable to cases pending on appeal on that date. (§ 12022.53, subd. (h); Stats. 2017, ch. 682, § 2 (Sen. Bill No. 620), eff. Jan. 1, 2018; *People v. Woods, supra*, 19 Cal.App.5th at p. 1090.) Remand is appropriate because the record does not clearly show the trial court would have declined to strike the enhancement. (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.)

DISPOSITION

We remand the matter for the trial court to consider whether to exercise discretion to strike the gun enhancement. We otherwise affirm the judgment.

HULL, J.

We concur:

RAYE, P. J.

HOCH, J.